No. 22,654

In the

United States Court of Appeals

For the Ninth Circuit

DON W. MCNAMARA and GENEVIEVE C. MCNAMARA,

Appellants,

vs.

JONES & GUERRERO CO., INC.,

Appellee.

Brief of the Appellants

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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ISSUE PRESENTED FOR REVIEW

At the time the summary judgment was rendered in this action, were there pending genuine issues as to any material facts?

NATURE OF THE CASE

This is an action by an employer (appellee) for damages for the breach of an employment contract (Transcript p. 1) and on an account stated (Transcript p. 2) wherein the employees (appellants) counterclaim for damages for fraud (Transcript pp. 39-40) and to recover their wages. (Transcript pp. 40-1)

COURSE OF PROCEEDINGS

On 31 January 1967 the employer filed its complaint (Transcript pp. 1-2), and the employees filed their answer on 28 September 1967 stating their counterclaims. (Transcript pp. 39-41) On the latter date the employees demanded a jury trial. (Transcript p. 45) The employer answered on 6 November 1967 (Transcript p. 68) and, thereafter (on 21 November 1967), the employer moved for summary judgment. (Transcript p. 75)

DISPOSITION IN COURT BELOW

On 14 December 1967, without giving the employees any opportunity to be heard (Transcript p. 89), the court below granted the motion and entered summary judgment in favor of the employer. (Transcript p. 95) The employees filed their notice of appeal on 28 December 1967. (Transcript p. 97)

FACTS RELEVANT TO ISSUE

In their answer (Transcript pp. 36-41) the employees raised genuine issues as to material facts by denying *inter alia* that they quit without the consent of the employer; that they owe the employer any sum pursuant to the employment agreement; that an account was stated between the parties; that any sum was found due the employer from its employees upon the statement; or that the employees agreed to pay the employer any amount. (Transcript pp. 36-7)

The employees raised additional genuine issues as to material facts by setting forth affirmatively in their answer (Transcript pp. 36-41) the following defenses (Transcript pp. 37-9):

"FOURTH DEFENSE

"6. Defendants [the employees] have performed all of the conditions of the agreement set forth in the amended complaint except defendants failed to con-

tinue their employment for a full period of 24 months as provided in said agreement.

"7. Defendants failed to perform said condition in said agreement for the reason that plaintiff [the employer] prevented performance by requiring defendants to work approximately an average of 18 hours per day; requiring defendants to work never less than six and often as much as seven days per week; never giving defendants any managerial authority but assigning them staff positions and requiring them to perform mineal services under the management of Robert H. Jones; assigning defendants the duty of personally operating the motel and a great number of housing units other than the motel; not having an operable restaurant before 26 November 1966; not, prior to 26 November 1966, giving defendants meals without cost to them and thereafter not giving defendants more than one such meal per day; furnishing defendants with an inadequately furnished, dirty motel room; and selling defendants an automobile considerably above cost.

"8. Defendants were and are ready, willing, and able to perform said condition of said agreement.

"9. On or about 27 January 1967 defendants tendered full performance of such condition of said agreement, but plaintiff refused and continues to refuse to permit defendants to perform said agreement.

"FIFTH DEFENSE

"10. On or about 24 and 25 September 1966 plaintiff, intending to induce defendants to enter the agreement set forth in the amended complaint, stated and represented to defendants that defendants would be required to work no more than 40 hours per week; defendants would have two work-free days per week; defendants would be restaurant and hotel managers; defendants main duties would be restaurant operation and only would have to inspect motel rooms and super-

vise motel staff; the restaurant would be operable by 18 October 1966; defendants would receive all of their meals without cost to them; defendants would be furnished an adequate, furnished house; and defendants would be sold an automobile at cost.

"11. Said statements and representations made by plaintiff were false and fraudulent and were known to be false and fraudulent when made.

"12. On or about 18 October 1966 defendants executed said agreement, relying on said statements and representations made by plaintiff and believing them to be true.

"13. In truth and in fact defendants were required to work approximately an average of 18 hours per day; defendants were required to work never less than six and often as much as seven days per week; defendants were never given any managerial authority, but they were assigned to staff positions and required to perform mineal services under the management of Robert H. Jones; defendants were assigned the duty of personally operating the motel and a great number of housing units other than the motel; the restaurant was not operable before 26 November 1966; prior to 26 November 1966 defendants received no meals without cost to them, and from said date they each received only one such meal per day; defendants were furnished with an inadequately furnished, dirty motel room; and defendants were sold an automobile considerably above cost.

"14. Defendants did not know the truth with regard to said statements and representations and would not have entered said agreement if they had known the truth with regard to said statements and representations.

"SIXTH DEFENSE

"15. Plaintiff failed and refused to perform the conditions required by said agreement, and, as a result,

there has been a failure of consideration that plaintiff agreed to give defendants for their performance under said agreement.

"SEVENTH DEFENSE

"16. Said agreement referred to in the amended complaint is unenforceable for the reason that it is oppressive and contrary to public policy.

"EIGHTH DEFENSE

"17. On or about 27 January 1967 and after the making of the agreement set forth in the amended complaint but before any breach by defendants thereof, it was mutually agreed by plaintiff and defendants that said agreement should be rescinded."

Genuine issues as to material facts were raised by the employer in its reply (Transcript p. 68) to the employees' counterclaims. (Transcript pp. 39-41) The employer denied that it represented to the employees they would be required to work no more than 40 hours per week; they would have two work-free days per week; they would be restaurant and hotel managers; their main duties would be restaurant operation; they would only have to inspect motel rooms and supervise a motel staff; the restaurant would be operable by 18 October 1966; they would receive all of their meals without cost; they would be furnished an adequate, furnished house; and they would be sold an automobile at cost. The employer also denied that the employees were required to work an average of 18 hours per day; they were required to work never less than six and often as much as seven days per week; they were never given any managerial authority but were assigned to staff positions and required to perform mineal services; they were assigned the duty of personally operating the motel and a great number of housing units other than the motel; the restaurant was not operable

before 26 November 1966; prior to 26 November 1966 the employees received no meals without cost to them and from said date only one such meal per day; they were furnished with an inadequately furnished, dirty motel room; and they were sold an automobile considerably above cost. In addition the employer's reply denied that when it made the representations it knew them to be false; that the statements were made by it with the intent to defraud and deceive the employees and to induce them to act in the manner averred in their counterclaims; that the employees (at the time the representations were made) were ignorant of their falsity but believed them to be true; that in reliance thereon they were induced to enter into the agreement and (on or about 29 October 1966) traveled from the United States to Guam, settled in Guam, and commenced performance of the agreement; that had they known the true facts they would not have taken such action; that they had been damaged in the sum of $3,000; that they have duly performed all of the conditions of the agreement; that by the agreement the employer agreed to pay them for their services $1,000 per month for 24 months; or that any sum is due for their services.

In response to the employer's motion for summary judgment (Transcript p. 75) the employees preserved all of the above genuine issues as to material facts by filing an affidavit (Transcript pp. 82-7) in opposition thereto. In the affidavit (Transcript pp. 82-7) they said,

> "1. The Plaintiff herein was in default of the terms and provisions of the October 18, 1966 agreement, a copy of which is attached to the Complaint herein, prior to Defendants' termination of employment therewith, Plaintiff having already breached said agreement by reason of the hereinafter set forth facts.
>
> "2. Defendants Don W. McNamara and Genevieve C. McNamara are of the age of fifty one (51) and fifty two (52) years, respectively.

"3. Defendants have been engaged for the last 20 plus years in hotel and apartment management duties; that Defendant Don W. McNamara's last position was as manager of the Pine Terrace Apartments, 1001 Pine, San Francisco, California; that prior thereto and for a term of four years, he was manager of the Del Charo Apartments, Mt. View, California.

"4. On or about September 24, 1966, Defendants answered an ad in the San Francisco Examiner with respect to a position in the hotel-apartment business in Agana, Guam; that Defendants met with Mr. James Smith, Vice President of the Plaintiff, and the following representations with respect to a job in Agana, Guam with the Plaintiff were made by said James Smith to Defendants:

"(a) Plaintiff was a motel and restaurant operator in Agana, Guam;

"(b) Plaintiff was looking for a manager for a restaurant which was soon to be opened and which was to be the finest on the island of Guam; that Plaintiff was looking for a manager for said restaurant and for the management of a motel owned by Plaintiffs; that the said restaurant was ready to open;

"(c) Defendants' main duties would be to manage the restaurant and insofar as the motel was concerned the Defendants' only duty would be to occasionally inspect rooms and supervise the present staff; and that Defendants would be required to work only 40 hours per week and that there would be ample time for them to get away weekends to visit neighboring islands including Hong Kong and Tokyo;

"(d) Plaintiff assured Defendants that they would be in full management control of said restaurant and motel, subject, of course, to the reasonable but limited supervision of Mr. Robert Jones;

"(e) Said James Smith promised Defendants they would be furnished housing by the Plaintiff suitable to their position in Plaintiff's operations and comparable

with the best residences in Agana, Guam, and that such residences would be available in any event for rents not exceeding $125 a month.

"5. Defendants accepted Plaintiff's offer of employment in reliance of the foregoing representations and thereupon executed the agreement which is set forth as an attachment to the Complaint herein — *which agreement was prepared at the behest and direction of the Plaintiff and by its attorneys.*

"6. After Defendants arrived in Agana, Guam on or about 29 October, 1966, they found that Mr. James Smith, agent of the Plaintiff had misrepresented each and every one of the representations set forth in paragraph 4 hereof and that the building which was to become the new restaurant (subsequently called The Red Carpet Steakhouse) was surrounded by weeds and nothing had been done to the interior of the building to put it in condition for its opening; the motel turned out to be a twenty unit inadequate building known as the Cliff Motel; Defendants' salaries did not commence until November 1, 1966 and the restaurant did not open until November 26, 1966.

"7. The duties assigned Defendants were over and beyond the duties they had agreed to undertake pursuant the agreement which is attached to the Complaint for in addition to the agreements set forth therein as Defendants understood them pursuant the oral representations made to Defendants prior to the execution of said agreement, Defendants were required to work approximately an average of 18 hours per day and never less than six and often as much as seven days per week; Defendants were assigned an additional job of managing the Plaintiff's housing, staff and rental units and were charged with the duties of receiving complaints, issuing work orders, showing and renting apartments in Maite as J & G Housing, including sixteen rental units which had to be cleaned up and set up as motel rooms, and Defendants were not given the managerial authority they required to perform their duties.

"8. Said James Smith was aware at the time he made the previously mentioned representations to Defendants that said representations were false; that said James Smith made said representations with a malicious intent knowing them to be false and knowing that said representations would be relied upon by the Defendants to the detriment they now find themselves in; that said James Smith acted fraudulently and maliciously in the making of said representations.

"9. Plaintiff and its principal officer Robert Jones were at all times aware of said fraudulent misrepresentations made by James Smith to the Defendants.

"10. Defendants recognizing the fact that Plaintiff had breached its contract with Defendants and having lost all patience with the Plaintiff's method of operation, on or about January 26, 1967 decided to serve Plaintiff with notice of Defendants' intention to leave Plaintiff's employment; Defendants orally informed Robert Jones of their reasons for leaving Plaintiff's employment; that Defendants thereupon sent Plaintiff a January 26, 1967 letter referred to at page 3 of the Plaintiff's amended motion for summary judgment; that although Plaintiff has used that letter for the purpose of evidencing a repudiation of the contract such was clearly not the intention of the Defendants; that although Defendants believed they had good cause for leaving the Plaintiff's employment and although they had made those reasons orally known to the Plaintiff they did not want to leave the Plaintiff's employment under unpleasant circumstances and consequently sent Plaintiff the January 26, 1967 letter; Defendants had no desire to engage in litigation with Plaintiff on the island of Guam and only wished to leave the island and return to their home without repercussions arising out of the potential dispute they might have with Plaintiff; Defendants are not the kind of people who would make harsh accusations in a letter and expected to do so only as a last resort; furthermore, Defendants did

not want it a part of their record that they had terminated employment under unpleasant circumstances; they believed the contract had already been repudiated by the Plaintiff by reason of Plaintiff's aforesaid misrepresentations; Defendants believed they had made a mistake in accepting employment with the Plaintiff on the island of Guam and in accepting Plaintiff's representations but it was not in their nature to accuse Plaintiff at that time of an act of fraud.

"11. Defendants incorporate by reference herein each and everyone of the allegations made in the answer and counterclaims filed herein by Defendants' attorneys Barrett, Ferenz, Trapp & Gayle on the 6th day of November, 1967 and adopt said allegations as if set forth in full herein."

SUMMARY OF ARGUMENT

The Summary Judgment Herein Should Not Have Been Rendered, as There Were Pending in This Action Genuine Issues as to Material Facts.

According to Federal Rule of Civil Procedure 56(c),

> "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

The employees believe they have amply demonstrated above that there were many genuine issues as to material facts pending in this action.

It is realized by the employees that their statement of the case is extremely prolix. It was necessary, however, to attempt to set forth each "genuine issue as to any material fact" raised in the court below.

While the employees' statement of the case may not make interesting reading, this court must of course examine the transcript to determine whether there was any genuine issue

as to any material fact pending when the court below entered its summary judgment. The employees can only set forth for this court, in as orderly a manner as they are able, the genuine issues as to material facts as they were raised, and submit the issue presented for review for this court's decision.

It is urged, however, that that decision will have to be based on the rules of law hereinbelow.

ARGUMENT

1. Summary Judgment Is Authorized Only Where After Looking at the Record in the Light Most Favorable to the Opposing Parties It Is Quite Clear What the Truth Is and That There Is No Genuine Issue Remaining for Trial.

The Supreme Court of the United States has held,

> "Summary judgment should be entered when the pleadings, depositions, affidavits, and admissions filed in the case 'show that [except as to the amount of damages] there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' . . . This rule authorizes summary judgment 'only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, . . . [and where] no genuine issue remains for trial . . . [for] the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try.' . . .
>
> ". . . . .
>
> ". . . We look at the record on summary judgment in the light most favorable to . . . the party opposing the motion . . . ." *Poller v. Columbia Broadcasting System,* 368 U.S. 464, 467, 473, 7 L.Ed.2d 458, 82 S.Ct. 486 (1962); *Consolidated Electric Co. v. United States,* 355 F.2d 437 (9th Cir. 1966); *United States v. Western Electric Co.,* 337 F.2d 568 (9th Cir. 1964).

2. Since the Employees Have Demanded a Jury Trial Herein, the Court Below and This Court Should Be Extremely Cautious That It Be Not Denied Them.

In the decision just quoted, the Supreme Court of the United States added,

> "Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handled justice.'" *Poller v. Columbia Broadcasting System, supra,* 368 U.S. 464, 473, 7 L.Ed.2d 458, 82 S.Ct. 486 (1962).

And this court has held,

> "If a party has a right to jury trial upon a possible issue of fact, the courts should be extremely cautious that it be not denied him. . . .
>
> ". . . . .
>
> "In haste to dispose of a crowded calendar, a trial judge may be misled into believing a summary judgment is a quick solution for a problem. But this highly effective device should not be used as a substitute for trial on the facts and law. Especially is this true where the parties are entitled to trial by jury. It may be that plaintiff cannot win this lawsuit before a jury. The mere fact that the trial judge conceives this to be true does not endow him with authority to take the place of the jury and decide hotly contested issues of fact." *Cox v. English-American Underwriters,* 245 F.2d 330, 332, 333 (9th Cir. 1957).

CONCLUSION

In view of the above the summary judgment (Transcript p. 75) should be vacated and this action remanded for a jury trial.

Dated at Agana, Guam, 30 August 1968.

Respectfully submitted,

TRAPP & GAYLE

By HOWARD G. TRAPP
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